Supreme Court, U.S
FILED

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OFFICE OF THE CLERK

No. 99-___

In The

Supreme Court of the United States

JACQUELINE MCKINLEY,

Petitioner,

v.

NORTHERN TELECOM,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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37 pp

QUESTION PRESENTED

What is the minimum due process standard for a Federal Appellate Court when considering a motion to either grant a motion to extend the time to file an appellant's brief or to reinstate an appeal that has been dismissed for failing to timely file a brief?

PARTIES TO THE PROCEEDINGS

Petitioner Jacqueline McKinley is the plaintiff in this case. The defendant in the case, respondent here, is Northern Telecom.

Petitioner Jacqueline McKinley, pursuant to Rule 29.6 of the Rules of this Court, states that she is an individual and accordingly has no corporate affiliations.

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PETITION FOR A WRIT OF CERTIORARI

This appeal stems from a dismissal of an appeal from a trial court's summary judgment in a workers compensation retaliation case originally filed in Texas state court but removed to the Federal District Court on federal question jurisdiction. The Fifth Circuit Court of Appeals dismissed the appeal, not on the merits of the case, but on the procedural pitfall of failing to timely file the appellant's brief.

The brief was not filed because the Clerk of the Appellate Court failed to send the record to counsel for the Petitioner and because prior counsel for the Petitioner failed to recognize that his time limits for filing the brief were running even when he was not being provided the record of the trial court. Petitioner's motion for an extension of time to file the brief, which motion was filed prior to the Fifth Circuit Court dismissing the case, and Petitioner's motion to reinstate the appeal were both denied.

Due process is violated when appellate courts dismiss appeals for procedural shortfalls caused in whole or in part by the appellate court and/or when there is a clear intent **not** to abandon the appeal and there is no prejudice shown to the appellee. This Court should reverse and remand this case to allow Petitioner to file her appellate brief and for consideration of her appeal on the merits of the case.

OPINIONS BELOW

The initial opinion of the court of appeals (App. 1) and the court's order denying rehearing (App. 2) are not reported. The district court's summary judgment is not reported.

JURISDICTION

The dismissal order of the court of appeals was entered on August 4, 1999. (App. 1) Petitioner's motion for rehearing was denied on September 9, 1999. (App. 2) This Court has jurisdiction under 28 U.S.C. § 1254(1) and (3).

FEDERAL RULES INVOLVED

Federal Rule of Appellant Procedure 31(a) requires an appellant to "file a brief within 40 days after the record is filed." Federal Rule of Appellant Procedure 31(c) states that "an appellee may move to dismiss the appeal" if the brief is not timely filed. Federal Rule of Appellant Procedure 26(b) states that "[f]or good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires."

STATEMENT

A. FACTUAL BACKGROUND

Mrs. McKinley, Petitioner, was employed by Northern Telecom in Richardson, Texas. Over a period of several years, repetitive movements in her accounting clerk duties caused her to suffer right shoulder impingement. After filing a workers compensation claim, Mrs. McKinley alleges that she was retaliated against by her employer. This retaliation took the forms of changing the locks in her work station, supervisors going through her files, threatening to lay her off, excessive work performance monitoring, prying into her medical affiliations, denial of in-house education, offers to help her find outside employment, failing to follow doctor's work restrictions, increased procedures for attaining vacation and medical leave, and interference with disability and retirement benefits. Mrs. McKinley is still employed by Northern Telecom but her condition worsened and she is out on extended disability leave. It is unknown when she will be able to return to work.

B. DISTRICT COURT PROCEEDINGS

Petitioner McKinley brought suit in state court against Northern Telecom, alleging retaliation in violation of section 451.001 of the Texas Labor Code. The case was removed to federal district court by Defendant on federal question jurisdiction, certain claims being preempted by the Employee Retirement Income Security Act (ERISA), as amended 29 U.S.C. §§ 1001 *et seq.* After discovery, the

trial Court granted summary judgment dismissing the claims on January 19, 1999.[1]

C. COURT OF APPEALS' RULINGS

Mrs. McKinley timely filed her notice of appeal and paid the appellate filing fee on January 21, 1999. However, her appeal was initially dismissed on March 18, 1999 for failure of Petitioner to order a court reporter's transcript. (App. 14-15) On April 27, 1999, The Fifth Circuit Court of Appeals reinstated the appeal with the recognition that in the summary judgment case, there was no court reporter's transcript to order. (App. 14-15) Furthermore, the reinstatement order ordered the trial court clerk to send the trial transcript to the appellate court clerk. (App. 9) On May 4, 1999, the trial court clerk forwarded the case's record to the appellate court clerk. (App. 15)

Not having received the record from the appellate court nor confirmation that the appellate court received the trial court's record, prior counsel for Petitioner inquired of the whereabouts of the record on June 25, 1999 and was informed by the clerk that since they did not have an appearance form on file for counsel, they had not sent the record. (App. 4) On June 26, 1999, Petitioner's prior counsel filed a Motion For Leave To File Brief Out Of Time along with an appearance form. (App. 10-16)

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[1] Since this appeal complains of the Fifth Circuit's dismissal of the appeal on procedural grounds without addressing the merits of Mrs. McKinley's underlying complaints against Northern Telecom, the merits of the underlying suit will not be further discussed.

On July 8, 1999, Appellee filed an objection to Petitioner's motion and a motion to dismiss the appeal. (App. 4) On August 3, 1999, Petitioner's prior counsel finally received the trial court record (delivery was further delayed when Petitioner's prior lead counsel left his old law firm and the shipping company refused to deliver the trial record to the old firm, who still had an associate working on the appeal, and sent it back to the Appellate Court) (App. 5-6) but the Fifth Circuit signed its Dismissal order the very next day, August 4, 1999. (App. 1) Petitioner's prior counsel filed a Motion for Rehearing on August 16, 1999 (App. 3-17) which was denied on September 9, 1999. (App. 2)

REASONS FOR GRANTING THE PETITION

The Fifth Court of Appeals, unguided by any minimum due process review standards set forth by this Court, dismissed Petitioner's appeal for a procedural shortfall of an untimely brief and denied Petitioner's Motions for extension of time to file her brief and Motion to file brief out of time, both as moot, and denied Petitioner's Motion for rehearing. These rulings, effectively denying Petitioner her due process right to an appeal on the merits, were in error because the Appellate Court itself was a contributing cause of the brief being delinquent by failing to forward to appellant's prior counsel the record on appeal. Furthermore, there was no indication that Petitioner sought to abandon her appeal as the request for extension of time to file the brief was filed prior to the dismissal order and there was no prejudice shown to the appellee.

DURING THE LAST FIFTEEN YEARS, THE FEDERAL APPELLATE CIRCUIT COURTS HAVE INCREASINGLY DISMISSED APPEALS FOR PROCEDURAL PITFALLS SUCH AS FAILING TO FILE A TIMELY BRIEF. THIS COURT HAS NEVER RULED ON WHAT STANDARD SHOULD BE USED BY AN APPELLATE COURT IN CONSIDERING WHETHER TO GRANT AN EXTENSION OF TIME TO FILE A BRIEF OR WHETHER IT SHOULD REINSTATE AN APPEAL DISMISSED FOR FAILURE TO TIMELY FILE A BRIEF.

Twenty years ago, federal appellate courts were reluctant to terminate the appeal of a litigant whose counsel failed to timely file an appeal brief. In fact, in *Marcadia v. Rascoe*, 569 F.2d 828 (5th Cir. 1978), the Fifth Circuit stated:

> "This court is not required to dismiss every appeal which does not meet the time limitations of Rule 31. In Phillips v. Employers Mutual Liability Ins. Co., 239 F.2d 79, 80 n. 2 (5th Cir. 1969) the court said that the late filing of briefs is 'at most [a] non-jurisdictional [defect] in the prosecution of [t]his appeal, **which we consider insufficient to warrant dismissal.**' "

(emphasis added)

However as time passed and the appellate courts got more and more crowded, dismissal for failing to timely file briefs became more and more prevalent. The Second Circuit Court of Appeals put its bar on notice that it would begin to dismiss cases for failing to file briefs on time in 1985. *United States v. Raimondi*, 760 F.2d 460, 462 (2nd Cir. 1985). The Federal Circuit Court of Appeals gave notice to its bar in 1989. *Julien v. Zeringue*, 864 F.2d 1572, 1574 (Fed. Cir. 1989).

The courts have discretion to disregard procedural time deficiencies. Federal Rule of Appellant Procedure 26(b). However, the Circuit Courts of Appeals are all over the board as to what standard is used to grant time extensions and in dismissing for procedural deficiencies, and are similarly fractionalized in employing that discretion. The following table sets forth the standards used by each court by both local rules and practice:

	REVIEW STANDARD PER RULES	REVIEW STANDARD PER RULES[2]
D.C. Circuit		
	Extraordinary circumstances[3]	1988 – Extraordinary and compelling circumstances[4]
1st Circuit		
	Special circumstances[5]	1996 – Leniency but will dismiss[6]

[2] Review standard as reported in cases within last 20 years. Since Courts seem to becoming more stringent over time, the date of the reported case is also listed in the table.

[3] D.C. Cir. Rule 28(f)(1).

[4] *Barber v. American Security Bank*, 841 F.2d 1159, 1162 (D.C. Cir. 1988).

[5] 1st Cir. Rule 45.

[6] *Reyes-Garcia v. Rodriquez & Del Valle, Inc.*, 82 F.3d 11, 15 (1st Cir. 1996) (Considering a brief that violated a whole series of requirements imposed by applicable procedural rules, the court stated: "No one is perfect, and occasional oversights – fribbling infringements of the rules that neither create unfairness to one's adversary nor impair the court's ability to

2nd Circuit		
	Default to good cause[7]	1985, 1991 – Good cause and compelling circumstances[8]
3rd Circuit		
	Good Cause[9]	1989, 1991 – Extraordinary circumstances after opportunity to cure[10]
4th Circuit		
	Extraordinary Circumstances[11]	1967 – leniency[12]

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comprehend and scrutinize a party's submissions – ordinarily will not warrant Draconian consequences. But major infractions or patterns of repeated inattention warrant severe decrees.").

[7] Local rules of the Second Circuit do not set a standard, therefore, Federal Rule of Appellant Procedure 31(a)'s "good cause" standard is presumed. *See* 2nd Cir. Rules 27(f) and 38.

[8] *United States v. Raimondi*, 760 F.2d 460, 462 (2nd Cir. 1985); *United States v. Delia*, 925 F.2d 574, 575 (2nd Cir. 1991).

[9] 3rd Cir. Rule 107.2.

[10] *Horner Equipment International, Inc. v. Seascape Pool Center, Inc.*, 884 F.2d 89, 93 (3rd Cir. 1989) (Dismissals disfavored and opportunity to cure required); *Matute v. Procast Navigation L.T.D.*, 928 F.2d 627, 631 (3rd Cir. 1991), *cert. denied*, 502 U.S. 919, 112 S.Ct. 329, 116 L.Ed.2d 270 (1991), *overruled on other grounds, Neeley v. Club Med Management Services, Inc.*, 63 F.3d 166 (3rd Cir. 1995) (Compelling circumstances of medical emergencies in family excuses late filed brief after three extensions).

[11] 4th Cir. Rule 31(c); 4th Cir. Rule 45 requires 15 day notice from clerk of failure to comply with rules before dismissal.

[12] See *United States v. Hayes*, 378 F.2d 566, 568 (4th Cir. 1967) (In criminal case, court appointed counsel relieved of representation duties after missing several briefing deadlines even with clerk intervention.).

5th Circuit		
	Good cause defined as other litigation, complexity of issues and extreme hardship[13]	No published opinions discussing standards after the 1978 *Marcadia v. Rascoe* opinion cited previously. The facts of this case seem to suggest an unpublished higher standard.
6th Circuit		
	Default to good cause, extraordinary circumstances if expedited appeal[14]	No reported cases
7th Circuit		
	Default to good cause but provides for show cause order before dismissal. Good cause examples of other litigation, complex issues, or extreme hardship[15]	1995 – Leniency, then show cause[16]

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[13] 5th Cir. Rules 26.2, 27.1.1, and 31.4.1.

[14] 6th Cir. Rule 10(k) and I.O.P. 15.8.

[15] 7th Cir. Rules 26 and 31(c).

[16] See *United States v. Sosa*, 55 F.3d 278, 279 (7th Cir. 1995) (Document filed was not a brief, appellant ordered to show cause within 14 days why appeal should not be dismissed.).

8th Circuit		
	Default to good cause, 15 day notice to cure[17]	1988 – Leniency, then show cause, if no harm – not grounds for dismissal[18]
9th Circuit		
	Good cause for short extension, diligence and substantial need for larger extensions, second extensions require extraordinary and compelling reasons[19]	1991 – Extraordinary Circumstances but prefer attorney sanction to dismissal[20]
10th Circuit		
	Show timeliness not possible with diligence and priority defined as other litigation, complexity of issues or extreme hardship[21]	1989 – No dismissal for procedural briefing errors[22]

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[17] 8th Cir. Rule 3c.

[18] See *Modern Leasing, Inc. of Iowa v. Falcon Manufacturing of California, Inc.*, 888 F.2d 59, 61 (8th Cir. 1988).

[19] 9th Cir. Rule 32.2.2.

[20] *Escobar-Ramos v. Immigration and Naturalization Services*, 927 F.2d 482, 485 (9th Cir. 1991).

[21] 10th Cir. Rules 27.4 and 31.4.

[22] *Mullen v. Household Bank – Federal Savings Bank*, 867 F.2d 586, 588 (10th Cir. 1989).

11th Circuit	extraordinary circumstances but clerk can grant moderate extensions[23]	No reported cases
Fed. Circuit	good cause; if filed after deadline – extraordinary circumstances[24]	1989 – leniency before dismissal[25]

This Court has never addressed the issue of what constitutes good cause and what due process considerations must be analyzed before an appeal can be dismissed for failure to timely file an appellant's brief.

In an effort to trim their dockets, courts in principal and practice, are increasingly willing to dismiss cases on procedural grounds. Petitioner asserts that to comply with procedural due process, the Court should avoid punishing a litigant for counsel's mistakes when at all possible and therefore follow the lead of the Third, Seventh, Eighth and Ninth Circuits and show leniency in granting initial extensions, increase the standard from "good cause" to "extraordinary circumstances" after the initial extensions, and disfavor dismissal – doing so only

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[23] 11th Cir. Rule 26.01, I.O.P. 1 and Rule 31.04, I.O.P. 2.

[24] Fed. Cir. Rules 26 and 31(d).

[25] See *Julien v. Zeringue*, 864 F.2d 1572, 1574-75 (Fed. Cir. 1989) (Case involved multiple extensions before initially being dismissed.).

after providing a chance to cure and a showing of harm to the opposing counsel, or in cases of demonstrated patterns of extreme disregard for the rules of the court.

In Petitioner's case, there was no pattern of extreme disregard for the Procedural Rules of the Fifth Circuit and Petitioner's prior counsel was never provided a reasonable opportunity to file a well planned and presented brief. Petitioner's prior attorney failed to receive the trial court's record from which to prepare his brief. Many factors contributed to this failure to receive the record. The Appellate Clerk disregarded the notice of appeal documents which contained Petitioner's attorney's address and did not send the record because no notice of appearance form was filed. The record is unclear as to why there was no notice of appearance form filed but it is apparent that the clerk did not timely inform Petitioner's prior attorney of the deficiency and the Federal Rules of Appellate Procedure do not address such a form. Fifth Circuit Rule 46.3 requires that such a notice be entered "at the time the case is docketed or upon notice by the clerk."

Furthermore, Petitioner's prior attorney was never provided notice of his deficiency and provided an opportunity to cure. Fifth Circuit Rule 42.3.1 provides that when a criminal appellant fails to file a brief, 15 day notice is provided before the clerk shall dismiss any case for failure to prosecute. No similar warning requirement is provided to civil appellants.

This case should be remanded, the Court record returned to Petitioner's counsel and such counsel be

provided a reasonable time to file the brief after receiving the court's record.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Texas Bar No. 16695450

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-10170

JACQUELINE MCKINLEY

Plaintiff – Appellant

v.

NORTHERN TELECOM

Defendant – Appellee

Appeal from the United States District Court for the Northern District of Texas, Dallas

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(Filed Aug. 4, 1999)

Before HIGGINBOTHAM, DAVIS, and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellee's motion to dismiss appeal is GRANTED.

IT IS FURTHER ORDERED that appellant's motion for leave to file brief out of time is DENIED AS MOOT.

IT IS FURTHER ORDERED that appellant's motion for an extension of time to file appellant's brief is DENIED AS MOOT.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-10170

JACQUELINE MCKINLEY

Plaintiff – Appellant

v.

NORTHERN TELECOM

Defendant – Appellee

Appeal from the United States District Court for the Northern District of Texas, Dallas

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(Filed Sep. 9, 1999)

Before HIGGINBOTHAM, DAVIS and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:

The appellant's motion for rehearing of Court's order of August 4, 1999 denying as moot appellant's motion to file brief out of time, denying as moot appellant's motion to extend time to file appellant's brief, granting appellee's motion to dismiss appeal, is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-1070

JACQUELINE MCKINLEY	§
Plaintiff-Appellant	§
	§
NORTHERN TELECOM	§
	§
Defendant-Appellee	§

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

APPELLANT'S MOTION FOR REHEARING

TO THE HONORABLE FIFTH CIRCUIT COURT OF APPEALS:

COMES NOW the Appellant, Jacqueline McKinley, and files this Motion For Rehearing and would respectfully show the court the following:

I.

This cause was dismissed by an order signed on March 18, 1999 and granted a reinstatement by the Court's order signed on April 27, 1999. (See Exhibit A). Along with the April 27th order, was a memorandum from the Court which stated that the district court clerk

was requested to send the record and/or exhibits to said Court as soon as possible. (See Exhibit B). Around this time, Appellant's counsel Donald W. Hill was elected to the office of City Council. With said election came the need to withdraw from the firm located at 1999 Bryan, Suite 3470, Dallas, Texas, 75201, and physically move to another location at 400 South Zang Blvd., Suite 600, Dallas, Texas 75208.

II.

The firm associate on the case, Tracey Wallace, was still positioned at the 1999 Bryan Street location and was handling the logistics for the receipt of the records. In June, 1999, Ms. Wallace inquired about the whereabouts of the records and was informed by the Court that an appearance form for Appellant's counsel had not been received. On June 26, 1999, Appellant's lead counsel of record, Don Hill, filed a Motion for Leave to File Brief Out of Time and the referenced Appearance Form with the Court. (See Exhibit C).

III.

On July 8, 1999, counsel for Appellee filed a Response in Opposition to Appellant's Motion to Extend Time to File Brief Out of Time alleging that Appellant had not received the record due to her counsel's own making because no Appearance Form was filed. However, counsel has shown by the facts stated herein and attached hereto Appellant's Motion for Rehearing that the requisite Appearance Form was, in fact, filed with the Court. (See Exhibit C).

IV.

On July 14, 1999, associate Tracey Wallace received a notice from UPS stating their not being able to complete delivery of a shipment from the Court of Appeals, Control #7522-P12-0231, due to an "Unknown Person." (See Exhibit D). On July 15, 1999, the associate followed up with a telephone call to UPS and requested a return delivery to the 1999 Bryan Street address, assuming that the shipment pertained to the Appellant's records. The associate then phoned lead counsel Don Hill's office to advise of the inquiry. At this time, lead counsel Don Hill's office followed up with the inquiry. Counsel's legal assistant, Vickie Griffin called UPS on July 20, 1999 and spoke with a representative by the name of Nancy. The UPS representative stated that her system revealed a phone call from Tracey Wallace on July 15, 1999 and a request to ship the materials back to the 1999 Bryan Street address. However, the system also showed that the package had inadvertently been shipped back to the Court of Appeals. At this time the UPS representative stated that she would request the Court of Appeals resend the materials to the 400 South Zang location because of the error. However, the UPS representative called back to say that the matter could not be corrected and that counsel's office would need to call the Court of Appeals and ask for Jennifer at extension 118 because she would have to verify the contents of the package before reshipment was allowed. The legal assistant called Jennifer at the Court of Appeals and did, in fact, verify the contents of the package, as well as inquired about the original shipment logistics. At this time the legal assistant was told that the records were initially shipped from the Court of Appeals

on July 8, 1999 and received by UPS in Dallas on July 12, 1999. The records were then shipped back to the Court of Appeals on July 19, 1999 and received on July 20, 1999. Jennifer advised the legal assistant that she would have the package mailed back to the 400 South Zang location to Appellant's lead counsel.

V.

Appellant counsel's office at the Zang location received the materials around August 3, 1999 and the order dismissing the appeal was granted and signed on August 4, 1999. (See Exhibit E).

VI.

Appellant had demonstrated good cause for the late filing of her brief. Appellees will not be prejudiced by the granting of this Motion for Rehearing. And further, this Motion is not clearly presented for delay but that justice may be served. The delays have not been due to any neglect or intentional indifference. In fact, there has been a consistent line of communications between Appellant and the Court of Appeals. The Appellant's cause was dismissed on a summary judgment basis. Appellant **needs** an opportunity to have her cause fully considered by this Court.

WHEREFORE, PREMISES CONSIDERED Plaintiff respectfully prays that she be granted an Order granting rehearing her cause of action.

Respectfully submitted,

/s/ Donald W. Hill
DONALD W. HILL
Texas Bar No. 09628400
400 South Zang, Suite 600
Dallas, Texas 75208
(214) 941-6814
(214) 941-1399 (Facsimile)
Counsel for Appellant

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served upon Appellees through their counsel of record, Carol Darling, Jenkins & Gilchrist, 1445 Ross Avenue, Suite 3200, Dallas, Texas, 75202, on this the 16th day of August, 1999.

/s/ Donald W. Hill
DONALD W. HILL

PLAINTIFF'S EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-10170

(Filed Apr. 27, 1999)

JACQUELINE MCKINLEY
Plaintiff-Appellant

v.

NORTHERN TELECOM
Defendant-Appellee

Appeal from the United States District Court for the Northern District of Texas, Dallas

---

ORDER:

IT IS ORDERED that appellant's motion to reinstate the appeal is GRANTED.

/s/ Jerry E. Smith
JERRY E. SMITH
UNITED STATES
CIRCUIT JUDGE

PLAINTIFF'S EXHIBIT B

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

April 27, 1999

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 99-10170 McKinley v. Northern Telecom
USDC No. 3:97-CV-2036-BC

The motion of appellant to reinstate the appeal referenced above is granted. The district court clerk is requested to send the record and or exhibits to this office as soon as possible.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: /s/ Debbie Kranz
Debbie Kranz, Deputy Clerk

Mr Donald Wayne Hill
Mr Robert Elwood Sheeden
Ms Nancy Hall Doherty, Clerk

MOT-2

PLAINTIFF'S EXHIBIT C

Law Offices of
Donald W. Hill
Attorneys and Counselors at Law
Donald W. Hill 400 S. Zang Blvd.
Suite 600
Dallas, Texas 75200
TELE: (214) 941-6814
FAX: (214) 941-1399

Direct Dial:

June 26, 1999

Debbie Kranz, Deputy Clerk
United States Court of Appeals
Fifth Circuit
600 Camp Street
New Orleans, LA 70130

Re: No. 99-10170 – McKinley v. Northern Telecom; USDC No. 3:97-CV-2036-BC

Dear Clerk:

Enclosed please find an original and three (3) copies of Appellant's Motion for Leave to File Brief Out of Time, along with the Appearance Form, in the above referenced appeal.

Counsel for Appellee is being notified of same by copy of this letter. Thank you for all your assistance in this filing.

Sincerely,

/s/ Cassandra Mathis
Cassandra Mathis
Legal Secretary to Don Hill

FORM FOR APPEARANCE OF COUNSEL

Only attorneys admitted to the Bar of this Court since October 1, 1981 may sign this form and practice before the Court. An application for admission is incorporated. Two persons from the same organization or firm may sign this form.

No. 99-10170

Jacqueline McKinley (Plaintiff) vs. Northern Telecom (Defendant)

The Clerk will enter my/our appearance as Counsel for Plaintiff

(Please list names of all parties represented)

who IN THIS COURT is

[ ] Petitioner(s) [ ] Respondent(s) [ ] Amicus Curiae

[✓] Appellant(s) [ ] Appellee(s) [ ] Intervenor

I certify that I am a member of the Bar of the Fifth Circuit Court of Appeals, or application for admission is being made below.

Donald W. Hill (Signature)	_____ (Signature)
Donald W. Hill (Type or Print Name)	_____ (Type of Print Name)
Partner (Title, If Any)	_____ (Title, If Any)
Law Offices of Donald W. Hill (Firm or Organization)	_____ (Firm or Organization)
Social Security No. 456-90-5366	Social Security No. ____
Date of Birth 11-3-51 Sex: [ ] M [ ] F	Date of Birth _____ Sex: [ ] M [ ] F
Resident State/Bar No. 09628400	Resident State/Bar No. _____

Street Address 400 South Zang Suite 600 Suite ___

City & State Dallas, Texas Zip 75208 Phone (214) 941-6814
Fax (214) 941-1399

NOTE: When more than one attorney represents a single party or group of parties, counsel should designate a lead counsel to whom notification is to be sent, with the understanding that if other counsel should be informed *he or she will perform that function.* If lead counsel has not signed above, lead counsel *must* complete his or her own form for appearance of counsel. The person to be notified in this case is:

Name of Lead Counsel (Type or Print) Donald W. Hill

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
APPLICATION AND OATH FOR ADMISSION
600 Camp Street, New Orleans, LA 70130

Name _____
(Last) (First) (Middle)

Firm or Agency _____

Street Address _____ Suite _____

City & State _____ Zip _____

Social Security No. _____

Phone ( ) _____ Resident State/Bar No. _____
Date of Birth _____ Sex: [ ] M [ ] F

ADMISSION FEE: Admission fees may be paid by personal check, certified check or postal money order. Please make payable to the Librarian, United States Court of

Appeals. Basis for amount of fee may be found in 5TH CIR. R. 46, which states:

> "Only attorneys admitted to the Bar in this Court may practice before the Court. Admission to the Bar of this Court is governed by Fed. R. App. P. 46. Each attorney shall pay to the Clerk an admission fee of $50, which shall be transferred to the Library Fund. An attorney who is appointed by the Court to represent an appellant in forma pauperis and an attorney who appears on behalf of the United States must have all other qualifications for admission, but shall be admitted to practice in this Court without payment of an admission fee."

FEE DATA: (Check One) [ ] Cash [ ] Check
[ ] Court Apptd. [ ] U.S. Counsel

CASE NUMBER (If Any): _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-10170

JACQUELINE MCKINLEY

Plaintiff-Appellant

v.

NORTHERN TELECOM

Defendant-Appellee

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME

TO THE HONORABLE FIFTH CIRCUIT COURT OF APPEALS:

COMES NOW the Appellant, Jacqueline McKinley, and files this Motion for Leave to File Brief Out of Time, and would show the court the following:

I.

In April 1999, this appeal was dismissed and subsequently reinstated. The record indicates that the appeal was initially dismissed because of the failure of Plaintiff's counsel to submit a request for transcript form. Based on

the fact that this cause is an appeal of a summary judgment, a transcript request was not necessary. A copy of the notice from the District Court clerk transmitting the record was sent to Plaintiff early in May, 1999. We have been awaiting the records since that date. Plaintiff and her counsel has complied with each aspect of her appeal. The dismissal of Plaintiff's appeal will effectively preclude the Plaintiff from having her appeal heard. The merits have never been evaluated by an appellate court, nor has the Plaintiff had her "day in court." Plaintiff should be allowed her appeal, particularly in light of the fact that the Defendant has not been prejudiced.

WHEREFORE, PREMISES CONSIDERED, Appellant hereby requests that her appeal be reinstated, that the records be forwarded to Appellant's counsel for the completion of the brief, and that the time be set by the Court for the filing of said brief.

Respectfully submitted,

LAW OFFICE OF DONALD W. HILL

/s/ Donald W. Hill
DONALD W. HILL
Texas Bar Card No. 09628400
400 South Zang
Suite 600
Dallas, Texas 75208
(214) 941-6846 (Telephone)
(214) 941-1399 (Facsimile)

ATTORNEY FOR
PLAINTIFF-APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served upon counsel for Appellee, Ms. Carol Darling, 1445 Ross Avenue, Suite 3200, Dallas, Texas 75201, via certified mail on this 25th day of June, 1999.

/s/ Donald W. Hill
DONALD W. HILL

PLAINTIFF'S EXHIBIT D

UPS	(date	(metered
METRO DALLAS	stamped)	postage mark)
10155 MONROE DR	DALLAS, TX	
DALLAS TX 75229	JUN 13 1999	

Dear Customer:

On 7/12/99, we received a package(s) for you from

Shipper Name	Control #	COD Account
US COURT OF APPEALS	7522-P712-8231	

We are unable to complete delivery because:

COMPANY OR PERSON UNKNOWN, NOT DELIVERED

Please telephone us at 1-800-877-1502
7:30 AM to 9:00 PM Monday through Friday
to provide delivery instructions.

If we do not hear from you by 7/19/99,
we must return the package(s) to the sender.

Thank you.

To:
WHITE, HILL, SIMS & WIGGINS
C/O MR. DONALD WAYNE HILL
ROOM 3470
1999 BRYAN ST
DALLAS TX 75201

REC'D JUL 14 1999

Supreme Court, U.S.
FILED
JAN 7 2000
CLERK

(2)

No. 99-974

In The

Supreme Court of the United States

JACQUELINE MCKINLEY,

Petitioner,

v.

NORTHERN TELECOM,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

ROBERT E. SHEEDER*
R. S. GHIO
JENKENS & GILCHRIST
A PROFESSIONAL CORPORATION
1445 Ross Avenue, Suite 3200
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(214) 855-4500
Counsel for Respondent
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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

21PP

QUESTION PRESENTED

May a Federal Court of Appeals properly dismiss an appeal where the appellant fails to timely file a brief as a result of the appellant's willful noncompliance with the requirements of the Federal Rules of Appellate Procedure and the Local Rules of the Court of Appeals?

PARTIES TO THE PROCEEDING

Respondent, Nortel Networks Inc. (formerly Northern Telecom, Inc.) is a wholly-owned subsidiary of Nortel Networks Corporation, a publicly traded company, and Petitioner is Jacqueline McKinley.

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STATEMENT OF THE CASE

On or about June 4, 1997, Petitioner filed her Original Petition in the 162nd District Court of the State of Texas, County of Dallas, alleging retaliation for having exercised her rights under the Texas Worker's Compensation Act. On August 19, 1997, Respondent, Nortel Networks Inc. (formerly Northern Telecom, Inc.) ("Nortel") timely removed the case to the United States District Court for the Northern District of Texas, Dallas Division, based upon federal question and diversity jurisdiction.

On December 8, 1998, Nortel moved for summary judgment on all of Petitioner's claims. On January 19, 1999 the District Court granted Nortel's Motion for Summary Judgment in its entirety and dismissed Petitioner's case with prejudice. On February 18, 1999, Petitioner filed a Notice of Appeal with the U.S. District Court.

Petitioner's appeal was dismissed not once, but *twice* by the Fifth Circuit Court of Appeals.[1] The appeal first was dismissed on March 18, 1999 for Petitioner's failure to timely order a transcript from the District Court and make financial arrangements for a transcript within the time fixed by the Fifth Circuit's Local Rules.[2] Although

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[1] Although only the second dismissal is the subject of the Petition, the details of the first dismissal are significant because they demonstrate a pattern of willful neglect and noncompliance with the rules by Petitioner, which culminated in the ultimate dismissal of her appeal.

[2] Petitioner implies that this first dismissal was an error by the Fifth Circuit, because the case had been dismissed on summary judgment, and therefore there was no transcript to order. Petition for Writ of Certiorari ("Petition") at 4. However,

the Clerk of the Fifth Circuit had directed Petitioner by letter of February 25, 1999 to "complete the transcript order form" within fifteen days or the case would be dismissed without further notice, Petitioner did not comply. In her motion to reinstate the appeal, Petitioner explained that her attorneys failed to submit the Transcript Order because they had *twice* attempted to submit the form to the *state* district court; apparently forgetting that the case had been removed. Motion to Reinstate at 2-4. Significantly, Petitioner's counsel admitted that they first attempted to complete the form one day before it was due; that they waited another *six* days before their second attempt to submit it to state court; and that they waited *another five days* to complete the form *after* they realized that the case was removed to the Northern District of Texas. Thus, they simply refused to act expeditiously, even when they knew that the deadline to file the form had passed.

The Fifth Circuit granted Petitioner's Motion to Reinstate on April 27, 1999. On May 10, 1999, the Clerk of the Fifth Circuit sent Petitioner's counsel a letter stating that the appeal had been docketed, and that Petitioner's brief was due within forty (40) days of the date of the letter.

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the Fifth Circuit's only means of knowing that there was no transcript was for *Petitioner* to file the Transcript Order Form, which provides a space on which an appellant can affirm that there were no hearings to be transcribed. Thus, even though the Fifth Circuit reinstated the appeal, there was no "recognition" that the dismissal was in error: clearly it remained Petitioner's duty to notify the Fifth Circuit, via the Transcript Order Form, that there were no hearings.

Among other things, the Clerk instructed Petitioner's counsel:

> If you have not filed an appearance form as required by 5th Cir. R. 46, you must do so within 10 days from this date. . . .
>
> *We will not forward the record until you file an appearance form.*

Letter of May 10, 1999 (attached hereto as Appendix 1) (emphasis added). This letter simply re-stated a similar instruction from the February 25, 1999 letter (an instruction with which Petitioner had not complied):

> All counsel who desire to appear in this case must sign and return the attached appearance form . . . within 15 days from this date, see Fed. R. App. P. 12(b) and 5th Cir. R. 12. If you fail to do so we will remove your name from our docket in this case. We cannot release official records on appeal unless you have entered an appearance.

Letter of February 25, 1999 (attached hereto as Appendix 2).

Despite these admonitions, Petitioner's former counsel did not file a form of appearance until June 26, 1999, some four months after receipt of the first notice, six weeks after the second notice, and approximately one week after the appellant's brief was due. That same day Petitioner sought additional time to file her brief, stating only that she and her counsel had been "awaiting" receipt of the record.

On July 8, 1999, Nortel responded to Petitioner's Motion and moved for dismissal of the appeal. The motion to dismiss was granted on August 4, 1999.

Undaunted, Petitioner filed a Motion for Rehearing on August 16, 1999. In that motion, Petitioner stated that her counsel had changed law firms "around" April 27, 1999. Further, she stated that an attorney at the prior firm who was "handling the logistics for receipt of the record" first called the Fifth Circuit on June 25, 1999 to find out where the record was, and she was informed at that time of her failure to file a Notice of Appearance Form. Motion for Rehearing at 2; Petition at 4. Petitioner never has explained why her prior counsel waited until several days *after* Petitioner's brief was due at the Fifth Circuit before making any inquiry as to the whereabouts of the record.

The Fifth Circuit denied the Motion for Rehearing on September 9, 1999.

SUMMARY OF REASONS FOR DENYING THE WRIT

Petitioner and her prior counsel engaged in a pattern of willful neglect and noncompliance with both the Federal Rules of Appellate Procedure and the Local Rules of the Fifth Circuit. Petitioner ignored two written directives from the Clerk of the Fifth Circuit to file a form of appearance, even though the Clerk clearly informed her that the district court record would not be released to her until she did so. Further, she failed to contact the Fifth Circuit regarding this issue until *after* the deadline to file her brief had passed. The Fifth Circuit's dismissal of the

appeal in the face of such recalcitrance is consistent with the Rules of Appellate Procedure and the Fifth Circuit's authority to enforce its rules and control its docket. The Fifth Circuit's decision is not in conflict with any other United States Court of Appeals on any important matter, nor is this a question of federal law sufficiently important to merit review by this Court.

REASONS FOR DENYING THE PETITION

I. The Court of Appeals is Expressly Authorized to Control its Docket by Implementing and Enforcing Local Rules.

The Federal Rules of Appellate Procedure expressly authorize each court of appeals to "make and amend rules governing its practice." Fed. R. App. P. 47(a)(1); 28 U.S.C. § 2071. Further, the courts of appeals are authorized to enforce those rules, with two limitations. First, "a local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement." Fed. R. App. P. 47(a)(2). Second, "[n]o sanction or other disadvantage may be imposed for any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement." Fed. R. App. P. 47(b). In the instant case, as demonstrated below, neither of these limitations is applicable, and therefore the Fifth Circuit acted within its authority by dismissing Petitioner's appeal.

Further, despite Petitioner's convoluted, contrived effort to create a "dispute" among the courts of appeals that would merit this Court's review, there is no requirement that the various local rules be identically worded or enforced. Indeed, the very fact that this Court, in promulgating the Federal Rules of Appellate Procedure, expressly provided for local rules, and thus contemplated that such rules would not be strictly uniform, demonstrates that the Court does not consider such diversity alone to be sufficiently important to warrant "correction" by the Court. In addition, the Rules themselves *do* address enforcement of local rules through the safeguards provided in Rule 47(a)(2) and 47(b), *i.e.*, by mandating that an appellant's rights may be denied only where there is actual notice of the Rule and willful noncompliance with that Rule. Therefore, Petitioner seeks a writ of certiorari in order to have this Court impose a uniform standard, even though such a standard *already* is provided in the Rules. Therefore, the Petition should be denied.

II. Petitioner Failed to File Her Brief in the Court of Appeals Due to Her Willful Noncompliance with the Federal Rules and the Local Rules of the Fifth Circuit.

The dismissal of Petitioner's appeal cannot be reversed as an improper sanction for a nonwillful violation of a local rule. First, Petitioner's failure to obtain the record on appeal was due to her failure to file a notice of appearance, which violated both Fifth Circuit Local Rules 12 and 46, as well as Fed. R. App. P. 12(b). Since this was

a violation of the Federal Rules themselves, the limitations of Fed. R. App. P. 47(a) regarding enforcement of local rules are inapplicable. Second, the conduct of Petitioner's previous counsel clearly constitutes willful noncompliance with the Rules.

Rule 12(b) of the Fed. R. App. P. provides that an attorney who files a notice of appeal must file "a statement with the circuit clerk naming the parties that the attorney represents on appeal." The Advisory Committee Notes to this rule explain:

> The rule allows a court of appeals to require the filing of the representation statement at some time other than specified in the rules so that if a court of appeals requires a docketing statement or appearance form the representation statement may be combined with it.

Advisory Committee Notes (1993 Amendment). Indeed, this is the approach taken by the Fifth Circuit, which provides in Local Rule 12:

> Counsel can satisfy the "representation statement" required by Fed. R. App. P. 12(b) by completing this court's "Notice of Appearance Form," and returning it to the clerk within 20 days of filing of the notice of appeal.

Fifth Circuit Rule 12. Thus, the Notice of Appearance Form which Petitioner failed to timely execute constitutes the representation statement required by Fed. R. App. P. 12(b). As a result, the dismissal of the appeal does not violate Fed. R. App. P. 47(a)(2), because Petitioner failed

to comply not only with a local rule, but with one of the Federal Rules of Appellate Procedure.[3]

Second, even if the dismissal of the appeal *is* governed by Rule 47(a)(2), the dismissal should not be reversed, because it came as a result of Petitioner's willful failure to comply with the rule. Curiously, Petitioner *still* has not explained why her previous counsel did not timely submit the Notice of Appearance Form, which resulted in their not obtaining the district court record. However, what we do know of her prior counsel's behavior demonstrates a pattern of willful noncompliance with the instructions of the court, including:

1. Failure to timely submit a Transcript Order Form, and delaying in correctly completing the form even after the deadline to submit the form had passed;

2. *Twice* ignoring written instructions from the Clerk of the Fifth Circuit regarding filing a Notice of Appearance Form;[4]

3. Never submitting any notice of lead counsel's change of address; and

---

[3] The Advisory Committee Notes to Rule 47(a)(2) clearly state that the Rule only addresses "violations that are not willful and only these involving *local* rules directed to matters of form." (Emphasis added).

[4] It is worth noting that when Petitioner's former counsel *did* submit the Notice of Appearance Form, it bore at the top a stamp from the clerk of the court identifying the case number. In other words, this form apparently was the one sent by the clerk on February 25, 1999, and Petitioner's counsel simply held on to the document for months before finally submitting it after the briefing deadline expired.

4. Failing to even inquire as to the whereabouts of the record until *after* the deadline to file a brief had passed.

Despite repeated instructions from the Fifth Circuit, and despite already having their client's appeal dismissed once due to their dilatory conduct, Petitioner's former counsel still knowingly sat on their hands while the briefing deadline passed. This is not a matter of mere oversight – it is a case of willful noncompliance with the Local Rules of the Fifth Circuit as well as the Federal Rules of Appellate Procedure. As the Advisory Committee Notes explain, Rule 47(a)(2) "does not limit the court's power to impose substantive penalties upon a party if it or its attorney stubbornly or repeatedly violates a local rule, even one involving merely a matter of form." Therefore, Fed. R. App. P. 47(a)(2) is inapplicable, the dismissal was appropriate, and this matter does not warrant review by this Court.

III. Petitioner Had Actual Knowledge of the Rules That She Violated.

As demonstrated *supra*, the dismissal of the appeal by the Fifth Circuit complies with Fed. R. App. P. 47(b), because Petitioner and her counsel had actual notice of the rules they were violating, by virtue of the written instructions from the Clerk of the Court on February 25 and May 10, 1999. Petitioner cannot in good faith maintain that she lacked notice of the rules she was flouting. Therefore, the Petition should be denied.

CONCLUSION

The Fifth Circuit properly acted within its rule-making and rule-enforcing authority in dismissing Petitioner's appeal. Petitioner repeatedly and willfully violated the Federal Rules of Appellate Procedure by failing to submit a Notice of Appearance Form and by failing to timely file her brief. The Fifth Circuit's dismissal of the appeal does not create any conflict among the Courts of Appeals, nor does it raise any issue of law sufficiently serious to merit review by this Court. Inasmuch as Petitioner took virtually no action to keep her appeal alive, it is improper for her to expect this Court to resurrect it. Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

ROBERT E. SHEEDER*
R.S. GHIO
JENKENS & GILCHRIST
A PROFESSIONAL CORPORATION
1445 Ross Avenue, Suite 3200
Dallas Texas, 75202
(214) 855-4500
Counsel for Respondent
* *Counsel of Record*

APPENDIX 1

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

May 10, 1999

Mr Donald Wayne Hill
White, Hill, Sims & Wiggins
Suite 2300
1999 Bryan Street
Dallas, TX 75201

No. 99-10170 McKinley v. Northern Telecom
USDC No. 3:97-CV-2036-BC

We have docketed the appeal as shown above, and ask you to use the case number in future inquiries. **We will send you a briefing checklist upon request.** The briefing checklist is also on the Internet at the Fifth Circuit's Website "www.ca5.uscourts.gov".

Briefing Notice. The record is complete for purposes of the appeal, see FED. R. APP. P. 12. Appellant's brief and record excerpts are due within 40 days of the date shown above, see FED. R. APP. P. & 5TH CIR. R. 28, 30, and 31. See also 5TH CIR. R. 31.1 to determine if you have to file electronic copies of the brief, and the format you must use.

Policy on Extension. The court grants extensions sparingly and under the criteria of 5TH CIR. R. 31.4. You must contact opposing counsel and tell us if the extension is opposed or not.

Reply Brief. We do not send cases to the court until all briefs are filed, except in criminal appeals. Reply briefs must be filed within the 14 day period of FED. R. APP. P. 31(a)(1). See 5TH CIR. R. 31.1 to determine if you have to file electronic copies of the brief.

Brief Covers. We have attached the caption for this appeal and ask you to use it on any briefs you file with this court.

Dismissal of Appeals. The clerk may dismiss appeals without notice if you do not file a brief on time.

Appearance Form. If you have not filed an appearance from [sic] as required by 5TH CIR. R.46, you must do so within 10 days from this date. You must name each party you represent, see FED. R. APP. P. and 5TH CIR. R. 12.

We will not forward the record until you file an appearance form.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By:/s/ Shari Stewman
Shari D. Stewman,
Deputy Clerk

Enclosure
cc w/encl: Mr. Robert Elwood Sheeder

BR-1

APPENDIX 2

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

February 25, 1999

Mr Donald Wayne Hill and
Ms Delia M Parker
White, Hill, Sims & Wiggins
Suite 2300
1999 Bryan Street
Dallas, TX 75201

No. 99-10170 McKinley v. Northern Telecom
USDC No. 3:97-CV-2036-BC

We have docketed the case and ask you to use the case number above in future inquiries.

You must first complete the transcript order form the district court clerk provided you. When completed, this meets your obligation to order the necessary portion(s) of the court reporter's transcript, see FED. R. APP. P. 10(b). Second, you must make financial arrangements with the court reporter to pay for the transcript. If you are pro se and unable to afford payment, you must file a motion with the district court requesting a transcript at government expense, and notify this court of the filing. We will then coordinate with the court reporter for a time to file the transcript. We will inform you if extensions of this time are allowed. If you do not order or make arrangements to pay for the transcript within the 15 days, we will

dismiss your appeal without further notice, unless the case is a criminal appeal and you are proceeding In Forma Pauperis, see 5TH CIR. R. 42.3.

We will provide information concerning the briefing of this appeal to all parties at a later date. If a transcript is unnecessary, notify us and we will start the briefing schedule.

All counsel who desire to appear in this case must sign and return the attached appearance form, naming each party you represent, within 15 days from this date, see FED. R. APP. P. 12(b) and 5TH CIR. R. 12. If you fail to do so we will remove your name from our docket in this case. We cannot release official records on appeal unless you have entered an appearance. Pro se parties do not need to file an appearance form.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By:/s/ C Tyler/snd
Cindy Tyler, Deputy Clerk

/snd
Enclosure
cc w/encl: Mr Robert Elwood Sheeder and
Ms Carol Ann Darling

DKT-2